IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

DOES, Plaintiffs, vs. STATE OF ALASKA, Defendant.	CASE NOS. 3AN-18-02687PR 3AN-18-02688PR
THE DISABILITY LAW CENTER OF ALASKA, INC., Plaintiff, vs. STATE OF ALASKA, DEPARTMENT OF HEALTH & SOCIAL SERVICES; JAY BUTLER in his official capacity as Commissioner of the Department of Health & Social Services; DIVISION OF BEHAVIORAL HEALTH; GENNIFER MOREAU-JOHNSON, in her capacity as acting director of the Division of Behavioral Health; ALASKA PSYCHIATRIC INSTITUTE; and DUANE MAYES in his official capacity as Chief Executive Officer of the Alaska Psychiatric Institute, Defendants.	CASE NO. 3AN-18-09814CI

ORDER

Motion for Interim Relief
Motion for Temporary Restraining Order or Preliminary Injunction
Findings of Fact and Conclusions of Law
Preliminary Injunction

I. Introduction.

The Court held evidentiary hearings concerning three consolidated cases. The Public Defender Agency filed writs of habeas corpus on behalf of two individuals who were being detained in a Department of Correction (DOC) facility pursuant to a Title 47 evaluation order (hereafter a "civil detainee"). In each of these two cases the respondent has filed a motion for interim relief. In the third case, the Disability Law Center (DLC) has filed a complaint concerning all civil detainees who are subject to a Title 47 evaluation order and who are awaiting transport to an evaluation facility. Most of these individuals are housed in hospital emergency rooms. Some are in DOC facilities; others may be in the community. The DLC has filed a motion for a preliminary injunction.

The parties do not disagree on the basic context of the litigation. The Alaska Psychiatric Institute (API) is in a crisis. It has inadequate staff and thus cannot operate at full capacity. It has a maximum capacity of 80 beds, but for over a year it has only been able to admit no more than half that number (and often even fewer) patients at one time. The actual maximum capacity fluctuates with the needs of the patient group. Some patients require more staff to safely care for them. When there are more high need patients fewer total patients can be accommodated by a set level of staffing. API's capacity fluctuates daily.

There are far more persons subject to an evaluation order than API can accommodate. The Department of Health and Social Services (DHSS) acknowledges that this crisis will likely continue for a significant period of time, although it is working to increase API staffing and thus reduce the number of persons awaiting entry at API.

The basic dispute is over what responsibility, if any, the DHSS has for those persons subject to a title 47 evaluation order, but not yet at API or another evaluation facility. The dispute has two central components: 1) the contrast between the physical facilities and programs available at DOC facilities in Anchorage compared to API, and 2) the length of the delay from the time a Title 47 evaluation order is issued and when the respondent is transported to API.

II. The Parties.

In 3AN-18-02687PR, B.A. filed a Petition for Writ of Habeas Corpus on 15 October 2018.[1] The petition alleged that B.A had been at API when he was arrested for assaulting a staff member. The criminal charges were dismissed after B.A was taken to the Anchorage Correctional Complex (AAC).

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[1] The following allegations are taken from the petition at 3-4. Because of the way the cases were consolidated, the focus of the litigants and the Court was on the conditions at API and various DOC facilities, rather than on the facts specific to the two originally named petitioners. Although there does not appear to be any dispute of the chronology of events concerning these two individuals, the Court is not making findings of fact concerning the chronology. The parties do agree that the allegations of how and why these persons got to and remained at DOC facilities are illustrative of the experience of other civil detainees.

The next day a mental health clinician, acting on behalf of DOC, filed a petition seeking a Title 47 evaluation.[2] That request was granted, but the order expired after 7 days. DOC filed a second petition and a judicial officer issued another evaluation order.[3] B.A. was released subsequently but the record does not reveal when.

In 3AN-18-02688PR, S.T. filed a Petition for Writ of Habeas Corpus on 15 October 2018.[4] A judicial officer issued a Title 47 evaluation order for S.T. when he living in the community. S.T. was taken to ACC, apparently because API was not then accepting new admissions. S.T remained at ACC for some period but has since been released. The record does not indicate when he was released from ACC or to where.

Both B.A. and S.T. named the DHSS and DOC and their respective commissioners as defendants. In the subsequent litigation separate assistant attorneys general represented the two departments.

The DLC filed its Complaint for Injunctive and Declaratory Relief on 19 October 2018. The DLC is designated as the protection and advocacy

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2 3AN-18-02595PR.

3 3AN-18-02669PR.

4 The following allegations are taken from the petition at 3. For the reasons described in footnote 1, the Court is not making findings of fact concerning the chronology.

(P&A) agency for the State of Alaska.[5] P&A agencies are authorized under various federal statutes to provide legal representation and other advocacy services on behalf of individuals with disabilities.[6] DLC sued DHSS, its Division of Behavioral Health, API, and their respective administrative heads.

III. The Amended Petitions, Relief Motions, and Consolidation.

Within days of filing their petitions B.A. and S.T. filed identical Motions for Interim Relief. They also filed amended petitions that raised the same claims, but under the generic John Doe appellation. The DHSS opposed the amendment, arguing that the cases brought by B.A. and B.T. were or would soon be moot and that habeas corpus was an inappropriate vehicle for claims that would address conditions applicable to many persons. DLC moved for a temporary restraining order or a preliminary injunction.

The Court was focusing on the motion to consolidate the three cases. Because API had reduced its capacity, judges in Anchorage were seeing objections in various forms in many cases involving individuals subject to evaluation orders. The Public Defender Agency had filed numerous motions protesting the delays in API admissions. The DLC complaint was a similar case but not directed at individual detainees. The Court expected dozens of cases that might turn on the

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5 Complaint for Injunctive and Declaratory Relief, 3AN-18-09814CI, at 2, ¶ 3.

6 *See* 42 U.S.C § 15041(a)(2).

physical conditions of DOC facilities and therefore thought it would be most efficient to create a record that could be used in many cases. While appreciating the argument DHSS was making about habeas corpus, the Court reasoned that any initial pleading deficiency would likely be corrected or be replace by another set of civil detainees in other cases. The Court granted consolidation and began working with the parties for inspections of various facilities.

IV. The Hearings and Visual Evidence.

The Court held evidentiary hearings on 14 and 28 November 2018, 14 February 2019, and 12, 19, 26, and 27 March 2019.

The Court and the parties visited API and DOC facilities at the Anchorage Correctional Complex and Hiland Mountain. Still photos and video depictions of the facilities have been entered into evidence. The Court will summarize that evidence in its Findings, but notes that the true flavor of the respective facilities can only be understood by viewing the photos and videos.[7]

The Court makes the following findings of fact:

V. Title 47 and the API Crisis.

1. Under Alaska's civil commitment and involuntary treatment statutes, AS 47.30.700-.915, a person may be detained who is alleged to be

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[7] The parties compiled the photos and edited the video footage. The Court heard testimony from witnesses who described what was depicted in those exhibits.

mentally ill and, as a result of that condition, alleged to be gravely disabled or to present a likelihood of serious harm to self or others. Evaluations may be conducted at an evaluation facility or by evaluation personnel. When a court issues a proper order for evaluating the respondent, an evaluation facility "shall accept the order and the respondent for an evaluation period not to exceed 72 hours."[8] "Evaluation personnel, when used, shall similarly notify the court of the date and time when they first met with the respondent."[9] Under AS 47.30.730, "In the course of the 72-hour evaluation period, a petition for a commitment to a treatment facility may be filed in court." However, under AS 47.30.720, "If at any time in the course of the 72-hour period the mental health professionals conducting the evaluation determine that the respondent does not meet the standards for commitment specified in AS 47.30.700, the respondent shall be discharged from the facility or the place of evaluation by evaluation personnel and the petitioner and the court so notified."

2. At present, 72-hour evaluations are conducted only at API, Fairbanks Memorial Hospital, and Bartlett Regional Hospital, the three facilities listed as Designated Evaluation and Treatment facilities by DHSS. Two other facilities, Yukon-Kuskokwim Health Corporation and Ketchikan General

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8 *See* AS 47.30.715.

9 *Id.*

Hospital, are state-designated Designated Evaluation and Stabilization facilities, but are not currently conducting evaluations.[10]

3. Orders issued under AS 47.30.700 list the facility or facilities at which the judicial officer is ordering the evaluation to be done.

4. Over the years, and particularly since the spring of 2018, there have been times when API has been unable to accept new respondents for 72-hour evaluations.[11] Under § PC-01-01.01 of API's Policies and Procedures Manual, as updated on March 14, 2019 by Deputy Commissioner Albert Wall, when API cannot admit new patients API will send out "capacity notifications" to a select group of state officials; the probate court and weekend magistrate; Department of Corrections; law enforcement; and a list of medical providers around the state.[12]

5. API regularly declares that it is at capacity. API Policy and Procedure § PC-01-01.01, Appendix A, VI directs API employees not to describe its refusal to admit new respondents using any of the following terms: "closed

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[10] Testimony of Albert Wall, March 21, 2019, at 9:01:55 – 9:02:18 AM.

[11] DLC's Exhibit 1; Testimony of Thomas Price, March 19, 2019, 8:52:26 - 8:53:42 AM.

[12] Defendants' Response to First Request for Production, DLC Exhibit 4, at 12-13.

beds; closed/shut down/frozen admissions; admissions on hold; diversion/divert."[13]

6. Testimony during the week of March 18, 2019, established that on Wednesday, March 20, API's capacity had been reduced to the new low of 27, instead of the 80 persons for which it was designed. [14] Eighteen of these patients were civil; 9 were forensic.[15] Under the circumstances, API will only let a respondent in for evaluation when another resident is discharged.[16] Testimony from a Wellpath official on Tuesday, March 26, 2019, was that the census at API then was in the "low 20s."[17]

7. When API is not able to honor the court order directing a respondent to be evaluated there, the respondent may be held in a number of different places. Defendants' submissions in response to paragraphs 17-19 of the Court's January 24, 2019 order, requiring DHSS to provide a roster of those

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13 *Id.* at 12.

14 Testimony of Dr. Deborah Guris at 8:48:09 – 8:48:43 AM; Testimony of Mark Kraft, March 20, 2019 at 12:56:33 – 12:56:50 PM; Testimony of Albert Wall at March 21, 2019, 11:18:32 – 11:18:50 AM.

15 Testimony of Dr. Deborah Guris at 8:49:16 – 8:49:57 AM.

16 Testimony of Albert Wall, March 21, 2019 at 9:10:50am "As an individual is discharged, we have the capacity to take new patients. So it's not that we are closed, when an individual is discharged we accept new patients."

17 Testimony of George Gintoli, March 26, 2019 at 10:04:11 AM.

affected by API's capacity issues, show that the places respondents are held include hospitals and correctional facilities such as Anchorage Correctional Complex (ACC).

8. In early October 2018 the administrators of ACC were warned by local hospital staff that API would be accepting even fewer patients and thus police would be bringing a greater number of persons subject to a Title 47 evaluation order to ACC and other DOC facilities to be housed until space opens at API or another evaluation facility.

9. When a respondent is being held at a correctional facility, the respondent is not free to leave. At ACC, respondents are housed alone in cells and are accompanied by officers when they leave their cells, and may not leave the facility on their own.

10. Respondents may not be free to leave when they are held at hospitals. At Alaska Regional Hospital, staff will try to convince patients not to leave, but if a patient departs, the staff calls the police.[18]

11. API maintains a wait list. Generally, it tries to admit respondents in chronological order of when they were first subject to a court order, but it makes exceptions for respondents being held in correctional facilities, whose admission may take precedence over admission of others. In addition,

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[18] Testimony of Thomas Price at 9:22:33– 9:23:40 AM; 9:24:15 – 9:25:45 AM.

determinations of API's capacity to take particularly acute patients may also impact the order in which respondents are admitted. API may inquire of correctional facilities and hospitals about a respondent's acuity level, but it does not systematically track respondents' acuities, and one reason for the inquiry into acuity is to see if the respondent has medical needs that ought to be addressed at places other than API.[19]

12. As of March 2019, the capacity of API was in the low 20s, which is the lowest anyone can remember it ever being. There are ten beds on the adolescent unit, ten beds on the forensic unit, and 60 beds for civil adult patients; API could house 80 patients total if it had enough staffing.

13. Part of the capacity problem stems from difficulty hiring and maintaining sufficient numbers of nurses and psychiatric nurse aides ("PNAs"). At times, such as October 2018, API's capacity was limited for this reason.

14. Part of the capacity problem results from not having sufficient numbers of psychiatrists, advanced nurse practitioners, or physician's assistants, collectively known as licensed independent practitioners or "LIPs." At times such as October 2018, API's capacity was not limited for this reason. As of March 2019, the lack of LIPs was the primary problem with API's capacity. When this case began in October 2018, there were six psychiatrists, two ANPs, and one

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[19] Testimony of Dr. Deborah Guris at 11:05:24 – 11:06:53 AM; Testimony of Mark Kraft at 1:21:20 – 1:07:20 PM.

physician's assistant. As of March 2019, there were three psychiatrists, three ANPs, and one physician's assistant. Testimony was that two psychiatrists would be quitting in the first week of April and that the third would be quitting May 1. The physician's assistant requires two collaborating physicians and would have to stop working during the first week of April if only one physician remained at API.

15. The Court has no evidence concerning the more recent level of staffing at API.

16. API is being monitored by several regulatory bodies. The Center for Medicare and Medicaid Services ("CMS") is the federal agency that monitors compliance with federal standards. Health Facilities Certification and Licensing ("HFCL") is the State agency that reviews API's license as a specialized hospital, and contracts with CMS to provide inspections. The Joint Commission is an independent body that also contracts with CMS to provide inspections. A facility can lose its "deemed status" with CMS, meaning the facility has performed so poorly that The Joint Commission will stop inspecting the facility and the State agency will take over. Both the Joint Commission and the HFCL have been inspecting API over the past two years.

17. The Alaska Occupational Health and Safety Office ("AKOSH") has been reviewing instances of employee injury at API. The Ombudsman's office has been reviewing API. Their inspection began because of allegations of overuse of patient seclusion, but expanded when former DHSS

Commissioner Davidson ordered local attorney Bill Evans to investigate workplace safety and possible hostile work environment.

18. As a result of these investigations, API currently has only a provisional license. A provisional license is the last step before a license is revoked.

19. API nearly lost its ability to participate in Medicaid. Wall testified that he had expected API would be shut down on February 1st 2019. Although API was permitted to continue to participate in Medicaid, CMS could return at any time to re-evaluate API as a whole, and may also inspect API if there are any complaints. If API were to lose its ability to participate in Medicaid, the evidence was that this would lead HFCL to re-inspect API, with the likely conclusion that API would lose its license and close.

VI. The Conditions at DOC Facilities for Civil Detainees.

A. Entry into a DOC Facility.

20. Civil detainees held at a DOC facility have gotten there in two circumstances. A small number have been charged with a criminal offense and have been arrested. They are processed into the facility as would be any other arrestee. Then the State dismisses the criminal charges. However, DOC staff has opined that the person meets Title 47 criteria and files a petition. Once the petition is granted the person remains at the DOC facility until transported to API.

21. The Court received descriptions of two persons who were held as civil detainees after criminal charges were dismissed. One male, S.K., had been at API where he was charged with assaulting another person and arrested.[20] Shortly after arriving at ACC the criminal charge was dismissed. DOC filed a Title 47 petition. The order granting the petition described S.K as "catatonic, lying in his cell with vomit in his hair and on the floor. Patient defecated on himself this morning. [Patient] needs evaluation and stabilization."

22. A second male, M.P. was also arrested at API for assault.[21] An assistant public defender went to speak to him. She met with him for ten minutes but he was largely non-verbal.

23. Prior to roughly October 2018 if Anchorage police had a person thought to meet Title 47 criteria (whether or not there was an evaluation order in place) the police would deliver that person to API. Once API's capacity plummeted, API would not always accept such a person. In those circumstances the police delivered the person to a DOC facility.

24. Shelly Wilson-Schoessler, the medical supervisor at Hiland Mountain Correctional Complex, testified about a young woman (last name W.) who came there as a civil detainee on a Thursday or Friday. She was unstable, psychotic, and very manic. She refused to eat and smeared her food on the walls of

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20 *See* petition and order in 3AN-18-02866PR.

21 *See* petition in 3AN-18-02866PR.

her cell. API advised that she was second on the list to be accepted. When Wilson-Schoessler came to Hiland on the next Monday the woman was still there and had improved. She was never transported to API. The woman accepted medication on her fourth day at Hiland Mountain. Wilson-Schoessler called a contract evaluator who came and re-evaluated W.[22] authorized W.'s release and had the order dismissed. W. left Hiland Mountain on either Monday or Tuesday.

25. DOC has contracted with an evaluator who can come to DOC facilities to evaluate persons to determine if they meet Title 47 criteria for the filing of an initial petition or, if the person is already subject to a Title 47 order, to determine whether that person no longer meets criteria and thus should be released without going to API.

B. The Booking Process.

25. The ACC has a booking area where all arrestees and civil detainees, male and female, are processed. Before entering the booking area both civil detainees and inmates enter ACC through a sally port, pass through a metal detector and are placed in a holding cell in the pre-booking area. DOC medical staff does an initial evaluation of the person's mental and physical status to determine if the person is stable enough to be accepted by DOC or, instead, may need to go to a hospital emergency room. DOC staff checks the adequacy of the

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[22] Wilson-Schoessler was not certain if the evaluator authorized W's release or asked the court to vacate the order.

documentation that the police officer. Only then does DOC take physical and legal custody of the person and move that person into the internal booking area.

26. Both civil detainees and inmates are held in holding cells on the perimeter of a reception area. Most are roughly the same size, about 12 feet by 10 feet. Civil Detainees are placed individually in a holding cell. The lights are always on in the holding cells. The holding cells are spare. There are bunks in each holding cell. Food is brought to the holding cells, as no cafeteria exists in the holding cell area. Civil detainees may call an attorney.

27. Civil detainees are not moved from booking until they agree to comply with a strip search.

28. A male civil detainee remains in a booking holding cell until there is room available in the ACC acute mental health unit, which is called "Mike Mod." It is in a building adjacent to the ACC. If a male civil detainee agrees to be strip-searched, then he is transferred to a cell in Mike Mod; otherwise, he remains in a booking holding cell. No one is forcibly strip-searched. The detainee is handcuffed when transported to the other building.

29. A female civil detainee remains in a booking holding cell until there is room available at the mental health unit at Hiland Mountain. When a female civil detainee is taken to Hiland Mountain, she is transferred by van. She is handcuffed and in leg restraints during the transport.

C. Mike Mod.

30. Mike Mod houses acutely mentally ill prisoners in a jail setting. It has two tiers of cells facing a central open area where DOC staff has desks. The cells have glass walls facing the central area. There is no special room or designation in the module designed specifically for civil detainees. However, DOC usually places civil detainees in one of the cells on the ground floor near the entrance to the module. The cells themselves are essentially identical to the others.

31. When any person enters Mike Mod, there is an admission interview to establish their safety and mental status. At Mike Mod, a psychiatrist makes rounds every morning. The psychiatrist will discuss and offer medication if the civil detainee is able to discuss and accept medication. Psychiatrists are available by telephone following morning rounds, but are not on-site after morning rounds. One-to-one counseling is available, either in the cell or with a counselor speaking through the door.

32. Detainees and inmates are subject to physical restraints anytime they are outside their cells.[23]

33. Detainees and inmates are required to wear correctional uniforms although the respondents wear a different color than the inmates.[24]

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[23] Transcript of Evidentiary Hearing, November 14, 2018, at 37, 40.

[24] Transcript of Evidentiary Hearing Vol. II, November 14, 2018, at 15.

34. Detainees and inmates are held in cells that have no exterior windows.[25]

35. Detainees and inmates do not have beds with mattresses, they are provided with a steel platform or concrete slab to sleep on.[26] These cells also provide the standard jail toilet and sink.

36. Detainees and inmates are not allowed any personal items from outside.[27]

37. The conditions under which the State holds respondents at correctional facilities are harsher than the conditions experienced by an inmate who is mentally ill but detained on criminal charges.[28]

38. To protect their safety, a detainee is not allowed direct contact with inmates. Detainees are segregated from inmates. A detainee is allowed into the common area outside the cell or into an adjacent outdoor exercise area but only when no inmates are present. It is common for a detainee to be secluded in a cell in what is essentially solitary confinement for twenty-three hours a day.[29]

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[25] Transcript of Evidentiary Hearing, November 14, 2018, at 58.

[26] Transcript of Evidentiary Hearing, November 14, 2018, at 57-58.

[27] Transcript of Evidentiary Hearing, November 14, 2018, at 62.

[28] Transcript of Evidentiary Hearing, November 14, 2018, at 110.

[29] Transcript of Evidentiary Hearing, November 14, 2018, at 36.

39. A detainee is afforded less treatment opportunities than an inmate. A detainee is not given the opportunity of any group therapy or educational classes that are offered to inmates.

40. DOC staff generally speaks to detainees or inmates through the trap on the cell door. Occasionally, a detainee or an inmate may be allowed out of the cell and shackled to a bench to speak with a clinician at a table.

41. A detainee eats his meals in his cell. Food is delivered through the trap on his cell door.

D. Hiland Mountain.

42. Female civil detainees and inmates are housed in the same mental health unit. The cells for civil detainees are the same as those for inmates.

43. Female civil detainees are prevented from participating in most mental health, recreational, and socialization activities on the unit as they are segregated from inmates detained on criminal charges.

44. Female civil detainees may only be outdoors for a very limited period of time in a small area that is enclosed with chain link and barbed wire.

45. Female civil detainees can voluntarily accept mental health services from the Hiland Mountain mental health staff.

E. Access to Counsel.

46. The ACC, both Mike Mod and the booking cells, and Hiland Mountain unit permit civil detainees to contact their attorney, which is usually the Public Defender Agency.

47. There are obstacles in practice, however. There is no formal process. DOC staff verbally tells the respondents how to contact their attorneys, but do not give civil detainees written notice of their rights. When attorneys make appointments to see civil detainees, DOC staff will not notify the attorneys if a civil detainee is transferred between facilities, resulting on occasion in an attorney arriving at a DOC facility expecting to be able to see their client, but discovering that they cannot. When an attorney asks to see their client, DOC personnel will check on the client, and depending on the client's condition, may inform the attorney that the client's condition does not permit reasonable interaction at that time. Usually the attorneys take the DOC personnel's word on the client's condition and do not press the issue, but there is an informal policy that the attorney can see the client/respondent to make their own determination. Telephones are available to civil detainees at the ACC booking cells, Mike Mod, and the Hiland Mountain unit. All three locations have places where civil detainees can meet with their attorneys in person.

F. API.

48. Civil detainees at API are held in dramatically different conditions than civil detainees at DOC facilities.

49. API is much more aesthetically pleasing than Mike Mod or the Hiland Mountain unit. A large, bright hallway with very high ceilings and windows runs the length of the building. There is a large gym and a patient cafeteria. There is an atrium called the Winter Garden with a coffee stand. At times, patients are allowed into the Winter Garden to have coffee or a drink. The patient rooms have bunks with bedding similar to that at the DOC facilities. The rooms have desks and a cabinet. A bathroom with shower is attached to each room. All the rooms have windows that look outside.

50. There are five patient units. Each unit has a nurse's station, a room with a television, a room with large windows for meetings or private conversations and a room for activities where patients may take their meals if their condition prevents them from going to the main cafeteria. Each patient unit has an attached yard. The yards are larger than the DOC yards.

51. Civil detainees are given hospital clothing upon arrival at API, but after safety has been established, are encouraged to wear their own personal clothing. API does not strip search civil detainees.[30]

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[30] Transcript of Evidentiary Hearing, November 14, 2018 at 58.

52. Civil detainees at API are housed in an unlocked bedroom with an exterior window, a regular bed and regular blankets. Bedrooms also feature a desk and dresser and a private bathroom with a conventional toilet and shower.[31]

53. Civil detainees have access to common rooms that have couches and chairs where they can sit with visitors and staff. Some common rooms also have televisions.[32]

54. Civil detainees are encouraged to participate in activities offered on their ward. Respondents are encouraged to attend a variety of group and individual therapies and classes.[33]

55. Civil detainees are given an opportunity to take meals in the API dining room or in the common room or their own bedroom.[34]

56. API has a gym for the patient to participate in physical exercise. The patient also can go outdoors in an area attached to each unit. The outdoor areas are enclosed but do not have any type of roof or ceiling. The

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31 Transcript of Evidentiary Hearing, November 14, 2018 at 58.

32 Transcript of Evidentiary Hearing, November 14, 2018 at 61-62.

33 Transcript of Evidentiary Hearing, November 14, 2018 at 61-62.

34 Transcript of Evidentiary Hearing, November 14, 2018 at 58.

outdoor areas look like courtyards that have benches to sit on and a basketball hoop and a barbeque that can be used for recreational activities.[35]

57. API patients are assigned to a psychiatrist who will work with other professionals on a treatment team, including a psychiatric nurse and a psychiatric social worker, to offer the patient an individualized treatment plan. The treatment team will immediately begin working with the patient on discharge planning so that the patient can leave API after he or she has stabilized with a safe plan. A patient may lodge any complaint that he or she has with his or her treatment with a patient advocate.[36]

58. The most important service available at API that is not also available at DOC facilities is involuntary non-crisis medication. DOC facilities may medicate for crisis reasons, or if the civil detainee agrees to non-crisis medication, but not otherwise. API can request the court grant an involuntary non-crisis medication petition.

G. Respondents in Hospitals and Other Facilities.

59. The hospitals that hold civil detainees in their emergency rooms vary in the treatment they provide a civil detainee. Not all have a

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35 Transcript of Evidentiary Hearing, November 14, 2018 at 61-62.

36 Transcript of Evidentiary Hearing, November 14, 2018 at 64.

psychiatrist available. Most hold civil detainees until the person can be discharged as no longer meeting commitment criteria or is admitted to an evaluation facility.

60. The Court only heard testimony about Alaska Regional Hospital.

61. Alaska Regional Hospital generally holds civil detainees (or any mentally ill patient) in its emergency department, which is not staffed with psychiatric specialists.[37] Civil detainees remain in an emergency department room on a 1:1 with a hospital staff member waiting outside the door.[38] The room is a typical emergency department room with modifications, such as the removal of medical equipment usually attached to the ceiling or walls, but which could be used by a civil detainee to harm himself or others. Emergency department rooms are not designed for long term occupancy.

62. Alaska Regional Hospital will sometimes discharge a Title 47 Respondent based on the decision of an emergency department physician and a social worker appearing via tele-med service.[39]

63. When a respondent is being held under court order at a facility, the facility provides a report to the Department of Law, the Public

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[37] Testimony of Thomas Price, March 19, 2019, March 9:03:46– 9:04:16 AM; 9:12:27 – 9:12:49 AM; 8:55:30 – 8:55:43 AM.

[38] Testimony of Thomas Price, March 19, 2019, 8:58:33– 9:00:27 AM.

[39] Testimony of Thomas Price, March 19, 2019, 9:09:52 – 9:11:50 AM.

Defender Agency or other appointed or retained counsel, and to the Court System every 24 hours regarding the respondent's status. If and when the facility discharges the respondent, the facility reports this on an MC-412 form submitted to the court and served upon the other parties.

64. These reports do not go to API or other designated evaluation and treatment facilities, and they do not go to the DHSS. The DHSS does arrange for a contract provider to transport a civil detainee to API.[40]

65. No one at API or with the State of Alaska provides any regular oversight or assistance to the authorities at a hospital or other non-correctional setting as they manage the care of respondents awaiting admission for evaluation.

66. As the Court discussed with Dr. Guris, it would be possible for the system to send personnel to evaluate respondents who are being held at hospitals,[41] but this is not something DHSS is now doing, and it is not something API has the current capacity to do.[42]

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[40] Testimony of Gennifer Moreau-Johnson, March 21, 2019, at 12:13:07 – 12:14:07 PM.

[41] Testimony of Dr. Deborah Guris, March 20, 2019, at 11:59:29 AM - 12:04:24 PM.

[42] Testimony of Dr. Deborah Guris [On whether 72-hour evaluations could be performed outside of a designated evaluation facility]

- 11:47:19 – 11:48:18 AM "So the State would need to determine that was a scope of practice for which they were going to assume liability and right

VII. Duration of Delay While Awaiting Transport to API.

The Court ordered DHSS to provide it and the parties with weekly reports that track the ex parte evaluation orders and the disposition of each. The reports show the total number of orders, the locations of the civil detainee while the order was in existence, and the amount of time that elapsed before the civil detainee arrived at API or there was another disposition. The Court has not confirmed the summary reports against source data. It assumes, without finding, that the description of the disposition of each case is accurate. The Court has complete reports for February through September 2019.[43]

From the reports the Court has extracted the number of days that elapsed from the time the order was issued until disposition in each case. For each month the Court has broken out the number of cases that were resolved in a specific number of days. Then, for the subset of civil detainees who were

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now it's not clear that the state does cover that activity - so I think it's not that it - just that there would be a lot of things that would need to happen and they would need to happen for every hospital in the state of Alaska...so there is the practicality of that that we would have to go through that process to make it happen and someone would not be able to do that and do their job at API at the same time."

- 11:50:12 11:50:37 AM "So, in theory, the state could hire someone and get them credentialed to every hospital in the state of Alaska and get them access to medical records and then figure out what to do about the insurance um, in theory, they could do that."

[43] The weekly reports were cumulative, including the data from the prior reports. The information in the tables that follow was extracted from the report dated 4 October 2019.

transported to API in each month, the Court has tracked the number of days from the issuance of the order until when the civil detainee was actually transported to API. And finally, the Court has identified the smaller subset of civil detainees held in a DOC facility and tracked the number of days it took to dispose of the order, whether by transport to API or release.

These results are set forth in tables for each month. Thus, for example, there were 119 orders in February. Of those, 55 civil detainees were transported to API. Thus 63 were released before getting to API. Of those who went to API, ten got there in one day; nine waited seven days; eight waited over a week. There were seven civil detainees who were housed at a DOC facility. Four left DOC in two days or less. Three were there for over a week. For some persons the reports indicated that they were at API from the outset. The Court speculates that this meant that a person voluntarily at API tried to leave against medical advice and API sought an evaluation order to keep the person at the facility. Those cases are depicted in the API column.

February 2019

Days	**API**	**≤1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**≥10**	**N/A**	**Totals**
To Dispo	4	29	20	20	8	9	6	11	6	4	2		119
To API	4	9	4	9	2	6	4	9	6	1	1		55
In DOC		3	1						1	1	1		7

March 2019

Days	API	≤1	2	3	4	5	6	7	8	9	≥10	N/A	Totals
To Dispo		24	25	20	11	4	9	5	5	3	16	4	126
To API		7	6	5	1	2	1	1	2		8		33
In DOC					1		2	1	2				6

April 2019

Days	API	≤1	2	3	4	5	6	7	8	9	≥10	N/A	Totals
To Dispo	1	26	15	14	16	5	7	5	5	5	18	3	120
To API	1	7	6	5	9	3	4	2	4	3	12		56
In DOC		1		1	1						2	1	6

May 2019

Days	API	≤1	2	3	4	5	6	7	8	9	≥10	N/A	Totals
To Dispo	1	28	22	5	13	8	6	14	3	4	17	2	123
To API	1	5	1	2	1	2	4	6	3	2	13		40
In DOC				1	1		3	2			1		8

June 2019

Days	API	≤1	2	3	4	5	6	7	8	9	≥10	N/A	Totals
To Dispo	1	19	24	20	13	13	7	8	4	2	11	5	127
To API	1	1	2	5	5	5	1	5	2	2	9		38
In DOC		1	2	2	3	2			1		1		12

July 2019

Days	API	≤1	2	3	4	5	6	7	8	9	≥10	N/A	Totals
To Dispo		28	16	24	11	10	6	8	2	2	4	1	112
To API		6	4	14	6	6	5	5	1	2	3		52
In DOC		1	1			2	1	2			3		10

August 2019

Days	API	≤1	2	3	4	5	6	7	8	9	≥10	N/A	Totals
To Dispo	1	19	22	20	14	12	6	8	5	4	2	2	115
To API	1	7	8	10	13	10	5	2	5	4	2		67
In DOC		2	3	4	2	2		4		1	1		15

September 2019

Days	API	≤1	2	3	4	5	6	7	8	9	≥10	N/A	Totals
To Dispo		32	20	8	14	11	2	13	6	3	4	14	127
To API		10	9	3	7	8	2	8	4	2	2		55
In DOC		1	2	3	5			3	2		2	5	18

67. There is no dispute that API is understaffed and therefore is not able to provide services to as many patients as the physical facility could house at any one time. There is no dispute that this problem has developed over several years and became especially acute in late 2018 and continuing into 2019. DHSS has elected to hire a private corporation, Wellpath, to take over operation of API. That effort has been delayed as DHSS's plan to have Wellpath employ API staff is subject to collective bargaining agreements that DHSS may have failed to honor.

Thus the transition to Wellpath has been delayed. It had been expected to take over operations by 1 July 2019, but that has been delayed until no sooner than September 2019.[44] The new goal had been to get the 80 bed capacity restored by September 2019.

66. DHSS is taking active efforts to address the API understaffing. It is hoping that Wellpath will have access to a greater pool, outside of Alaska, of potential permanent and temporary staff, than did DHSS. It is working with North Star in Anchorage and the Mat-Su Regional Hospital to encourage both to open treatment and evaluation beds. Both hospitals should have new beds available before the end of 2019. Those additional resources will reduce the number of persons subject to Title 47 evaluation orders who are awaiting admission at API or other evacuation facilities.

67. However, neither DHSS nor Wellpath has a plan to address those persons who are subject to a Title 47 evaluation order and not yet at API, other than to try to increase API staffing and expand beds at other facilities. DHSS and Wellpath are taking no steps to evaluate or treat those persons subject to a

[44] After the evidentiary hearings were completed DHSS announced that it was revisiting the decision to contract with Wellpath. This was not necessarily a decision not to privatize API or not to use Wellpath. The re-evaluation might delay the transition to Wellpath or another corporation. The Court heard no testimony about this and makes no findings of fact regarding it. The Court intends only to note that some circumstances may have changed since the evidence closed.

Title 47 evaluation order who are waiting in DOC facilities or in hospital emergency rooms.

68. Deputy Commissioner Wall testified that DHSS was not then fulfilling its statutory obligation to provide timely evaluations, by not meeting the 72-hour requirement of AS 47.10.715.[45] Taking caution not to express a legal opinion, Wall opined that DHSS was failing its moral obligation to those persons subject to a Title 47 evaluation order because of the delay in evaluation and treatment. As a result there were persons undiagnosed or inappropriately placed who deserved and needed care. It was also inappropriate to house persons in jails who had not been convicted or charged. These persons were "waiting for someone to come to their aid with no voice."

69. The Court took no additional evidence after the hearings in March 2019, except for the weekly reports of the disposition of evaluation orders. The Court can make no findings about the present status of the staffing at API or of the plan to have Wellpath take over the operation of API.

70. The tables summarizing the monthly orders and dispositions indicate little improvement in the disposition of persons subject to evaluation

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[45] Wall testified that he understood that the evaluation must be completed within 72 hours of the evaluation order, whereas The Alaska Supreme Court has construed AS 47.30.715 and other statutes to mean "the 72-hour period begins upon the respondent's arrival at that facility." *In re Gabriel C.*, 324 P.3d 835, 837-88 (Alaska 2014).

orders. Over the eight months covered by the reports the number of orders per month ranged from 112 to 127, a rather narrow range. In each of those months API admitted 55, 33, 56, 40, 38, 52, 67 and 55 persons. In each month DOC housed 7, 6, 6, 8, 12, 10, 15, and 18 persons. It is significant that the four months with the highest number of civil detainees at a DOC facility came in June through September 2019. The two months had the highest number of civil detainees, nearly a year after DHSS began responding to the API crisis and a half year after DHSS, Wellpath, and API officials testified about their ongoing efforts to increase capacity at API.

VIII. The Remedies Sought by the Doe Plaintiffs.

A. The Doe Allegations and the DHSS Response.

The Doe Plaintiffs filed a writ of habeas corpus in each of their cases wherein a Title 47 order had been issued. Their legal allegations and the remedies sought were basically the same. They claimed that they had been housed in a DOC facility while subject to a Title 47 evaluation order and that the State had violated various statutes[46] and deprived them of state and federal constitutional rights.[47] They later each filed an identical Amended Petition for Writ of Habeas Corpus

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[46] The Doe Plaintiffs alleged the State violated AS 47.30.660(b), .700, .705, .710, and .715.

[47] The Doe Plaintiffs alleged the State violated their procedural and substantive due process rights under the Alaska Constitution and the United States Constitution.

under the fictitious name, John Doe. The Amended Petitions do not make it clear whether John Doe is intended to be a pseudonym for B.A. or S.T., or instead is intended to represent any person detained in a DOC facility only because of a Title 47 evaluation order.

B.A. and S.T. then each filed a Motion for Interim Relief, seeking three remedies.[48] First, if a civil detainee was to be housed in a DOC facility, then DOC had to subject that person "to conditions equivalent to those experienced by individuals detained at a therapeutic facility."[49] Second, if a civil detainee was to be housed at a DOC facility, then the State "should ensure that such confinement occurs only in those cases in which the state has a basis to seek further detention, i.e., those cases in which the state has grounds to file a petition for a 30-day commitment."[50] Finally, they demanded that DHSS be ordered to maintain a central statewide list of existing civil detainees subject to a Title 47 evaluation order. Depending upon each detainee's circumstances, "including acuity and placement" DHSS should consider whether transfer to a less restrictive placement—i.e., transfer from a correctional facility to a private therapeutic bed—is available pending transfer to API."

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48 Motion for Interim Relief (17 October 2018).

49 *Id.* at 2.

50 *Id.*

DHSS opposed the motion. It primarily contested the ability of any person who has filed a petition for a writ of habeas to obtain any relief other than release from custody. B.A. and S.T. seek relief that would dictate the quality of the facility wherein they were held in custody and modify the threshold criteria for remaining in custody on a DOC facility. Given the limited remedy available from a writ of habeas corpus DHSS argues the Motion for Interim Relief should be denied. The Court agrees. However, B.A. and S.T. may still challenge the legality of the custody they suffered, even after they were released, because the public interest exception to the mootness doctrine may apply to their petitions for writ of habeas corpus.

B. Habeas Corpus Relief.

The Court agrees with DHSS that the only remedy available from a writ of habeas corpus is the release from the offending custody. In *Roberts v. State*,[51] the Alaska Supreme Court observed:

> It is generally held that habeas corpus will lie only to determine the legality of the particular sentence for which a petitioner is held in custody. Habeas corpus is not available to review questions, no matter how important, which are not related to the cause of petitioner's detention. These general principles are reflected in *Crow v. United States*, [186 F.2d 704, 706 (9th Cir. 1950)] where it was stated:

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[51] 445 P.2d 674 (Alaska 1968).

> It (habeas corpus) does not lie to secure a judicial decision which, even if determined in the prisoner's favor, would not result in his immediate release.[52]

The Doe Plaintiffs ask the Court to require DHSS to house a person subject to a Title 47 evaluation order at a DOC facility only if DHSS can show that the civil detainee meets the more rigorous criteria for a 30-day involuntary commitment.[53] They also want DHSS to create a statewide system to monitor all person subject to title 47 evaluation orders and create a prioritization system that would determine in what order those person would be admitted to API or another evaluation facility. These are remedies that go far beyond a simple order to have the wrongly detained person released from custody. These are requests for future systemic changes that are not available in habeas corpus case.

C. Mootness and the Public Interest Exception.

The Doe Plaintiffs cannot use habeas corpus to challenge the conditions or duration of any future Title 47 custody that they or others might suffer in the future. But if they were still currently detained, they could use habeas corpus to show that the detention violated statutory or constitutional rights and thus demand release. The Doe Plaintiffs have long been released from Title 47

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52 *Id.* at 676. *See also*, *Flanigan v. State*, 3 P.3d 372, 380 (Alaska App. 2000) (Mannheimer and Coats concurring) ("In other words, the writ of habeas corpus codified in AS 12.75 is not to be used as a writ of error (other than to test the court's jurisdiction)." (footnote omitted).

53 AS 47.30.730-.735.

detention. That suggests that their objections to their detention in a DOC facility are moot. However, depending upon the precise nature of their objection, the claim that they should not have been detained at a DOC facility may not be moot.

In *Wetherhorn v. Alaska Psychiatric Institute*,[54] a patient challenged a court order committing her to an involuntary commitment for thirty days. Alaska Statute 47.30.735(c) permits the court to "commit the respondent to a treatment facility for not more than thirty days if it finds, by clear and convincing evidence, that the respondent is mentally ill and as a result is likely to cause harm to the respondent or others or is gravely disabled." Wetherhorn challenged the constitutionality of the definition of "gravely disabled"[55] and the sufficiency of the evidence presented to the court about her alleged disability.[56]

By the time the case reached the Alaska Supreme Court Wetherhorn had long been released from the 30-day commitment. Nonetheless the supreme court addressed the constitutionality of the statutory definition of gravely disabled, holding that it had to be modified and narrowed in order to be constitutional.[57] But

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54 156 P.3d 371 (Alaska 2007).

55 156 P.3d at 376.

56 *Id.* at 380-81.

57 *Id.* at 378.

the supreme court would not address the sufficiency of evidence that the judge relied upon to issue the commitment order holding that claim to be moot.[58]

There is a public interest exception to the mootness doctrine. The three factors in determining whether the public interest exception applies are: "(1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine."[59] The supreme court reasoned that her commitment was based upon evidence unique to her condition at one time. If she was to be the subject of another commitment petition that request would turn on a different set of facts. Therefore the issue of the sufficiently of the evidence was not capable of repetition.[60]

The supreme court revisited the public interest exception in another commitment case, *In re Daniel G.*[61] Daniel G.'s father called the police when his

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58 *Id.* at 380 ("A claim is moot if it is no longer a present, live controversy, and the party bringing the action would not be entitled to relief, even if it prevails.") (footnote omitted).

59 *Id.* at 380-81 (footnote omitted).

60 *Id.* at 381.

61 320 P.3d 262 (Alaska 2014).

son threatened suicide.[62] The police took him to a hospital where staff filed a petition for a 72-hour evaluation.[63] A judge issued that order and Daniel G. was taken to API where he was released before the 72 hours expired.[64] Daniel G. challenged the constitutionality of the commitment order.[65] The trial judge denied a motion to vacate the order as moot.[66] The supreme court reversed, holding that the public interest exception applied.

> In *E.P. v. Alaska Psychiatric Institute,* [205 P.3d 1101 (Alaska 2009)] we applied the public interest exception when we determined that (1) the questions of statutory interpretation and procedure did not depend on the appellant's unique facts and were capable of repetition; (2) the questions would circumvent review because of the involuntary commitment time frame; and (3) the questions raised were "important to the public interest" because involuntary commitment entails a " 'massive curtailment of liberty,' " and "[t]he interpretation and scope of involuntary commitment statutes affect the power of the state to curtail the liberty of any member of the public." All three factors weigh in favor of review in this case.
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> First, as in *E.P.,* the disputed issues in this case do not depend heavily on Daniel's unique facts and therefore are capable of repetition. "When disputed issues turn on unique facts unlikely to be repeated, we have refused to find an exception to mootness." But Daniel is not challenging his initial detention, which might entail

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62 *Id.* at 264.

63 *Id.*

64 *Id.* at 265.

65 *Id.*

66 *Id.*

> case-specific factual analysis, but rather the fact that he was subject to an ex parte evaluation order. The question of the constitutionality of subjecting someone in custody under AS 47.30.705 to an ex parte proceeding arises every time that an evaluation petition is filed under AS 47.30.710(b).
>
> Second, due process challenges to evaluation orders under AS 47.30.710(b) will repeatedly circumvent review because the authorized 72–hour confinement period will have long since expired before an appeal can be heard.
>
> Third, Daniel argues that the question whether people are regularly subjected to unconstitutional ex parte proceedings in the superior court presents an issue of sufficient importance to the public interest as to justify overriding the mootness doctrine. Daniel also notes the importance of providing guidance to courts as to when such ex parte orders are permissible. The State argues that this case does not warrant discretionary review. But Daniel's due process claims do implicate the scope and interpretation of the statutory provisions that allow the State to curtail the liberty of members of the public. We thus conclude that Daniel's claims satisfy the third factor.
>
> Because all three factors of the public interest exception to the mootness doctrine are satisfied, we conclude that we will review Daniel's due process claims.[67]

There is little question that the second and third factors of the public interest exception are met in the Does' cases. Their time in the DOC facility was short, allowing little time to resolve claims before they were released. The curtailment of liberty implicates a strong public interest. The more difficult question is whether the Does' objections to detention in a DOC facility require

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67 *Id.* at 267-68 (footnotes omitted).

examination of facts unique to each of them or whether their objection turns on facts that are common to any detainee.

If the Does are asserting that no person subject to a Title 47 evaluation order may ever be detained in a DOC facility, then the circumstance of each detention are not relevant. Or, if the Does are claiming that detention in a facility run by DOC is not inherently forbidden as long as the place of detention has certain features, then it is the nature of the DOC facility itself that is critical. In their Motion for Interim Relief, the Does seek an order that if a civil detainee is to be housed in a DOC facility, then DOC may only subject that person "to conditions equivalent to those experienced by individuals detained at a therapeutic facility."[68] As a practical matter, no DOC facility is likely to soon have a unit equivalent to a therapeutic facility. That means the Does claim would require a ban on civil detainees being in a DOC facility for the foreseeable future.

The Does may be making a collateral claim, one that focuses not on the individual detainee or the physical facility, but rather on the duration of the detention. If the Does are claiming that there are statutory or constitutional limits on the duration of a detention, then determination of whether a particular detention exceeds the limit might not require exploration of the circumstances of an individual civil detainee's detention other than the duration. On the other hand, it

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68 *Id.* at 2.

may be that there is no fixed temporal limitation on detention, but rather the circumstances of the individual detainee are a factor in determining whether a sliding, flexible limit has been exceeded.

The starting point for determining whether there is an absolute ban on DOC detention or a temporal limit on that detention is Title 47. An evaluation of an individual to determine if he meets involuntary commitment criteria can begin in two ways. Any adult can petition to have a judge or her mental health professional designee evaluate the person.[69] If commitment criteria are met the judge may issue an order to have police take custody of the person and deliver him

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[69] AS 47.30.700(a) provides:

> (a) Upon petition of any adult, a judge shall immediately conduct a screening investigation or direct a local mental health professional employed by the department or by a local mental health program that receives money from the department under AS 47.30.520 - 47.30.620 or another mental health professional designated by the judge, to conduct a screening investigation of the person alleged to be mentally ill and, as a result of that condition, alleged to be gravely disabled or to present a likelihood of serious harm to self or others. Within 48 hours after the completion of the screening investigation, a judge may issue an ex parte order orally or in writing, stating that there is probable cause to believe the respondent is mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others. The court shall provide findings on which the conclusion is based, appoint an attorney to represent the respondent, and may direct that a peace officer take the respondent into custody and deliver the respondent to the nearest appropriate facility for emergency examination or treatment. The ex parte order shall be provided to the respondent and made a part of the respondent's clinical record. The court shall confirm an oral order in writing within 24 hours after it is issued.

to the "nearest appropriate facility."[70] Or a peace officer or certain defined professionals who believes certain emergency criteria are met, may cause the person to be taken into custody and brought to "the nearest evaluation facility."[71]

The statute authorizing the latter group to take a person into custody for an evaluation contains the following language: "A person taken into custody for emergency evaluation may not be placed in a jail or other correctional facility except for protective custody purposes and only while awaiting transportation to a treatment facility."[72] Thus detention in a jail is generally prohibited, except in

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70 *Id.*

71 AS 47.30.705(a) provides:

> (a) A peace officer, a psychiatrist or physician who is licensed to practice in this state or employed by the federal government, or a clinical psychologist licensed by the state Board of Psychologist and Psychological Associate Examiners who has probable cause to believe that a person is gravely disabled or is suffering from mental illness and is likely to cause serious harm to self or others of such immediate nature that considerations of safety do not allow initiation of involuntary commitment procedures set out in AS 47.30.700, may cause the person to be taken into custody and delivered to the nearest evaluation facility. A person taken into custody for emergency evaluation may not be placed in a jail or other correctional facility except for protective custody purposes and only while awaiting transportation to a treatment facility. However, emergency protective custody under this section may not include placement of a minor in a jail or secure facility. The peace officer or mental health professional shall complete an application for examination of the person in custody and be interviewed by a mental health professional at the facility.

72 AS 47.30.705(a).

limited circumstances. The statute that enables a judge to order a person into custody is silent on the use of a jail. What does this silence mean?

The lack of a prohibition could mean any person subject to a judicial order may be detained in a jail. On the other hand, the silence could be construed as a lack of any authority to detain any person subject to a judicial order in a jail. Instead that person must be taken directly to "nearest appropriate facility for emergency examination or treatment."[73] Persons who are taken into custody without a judicial order, may not be jailed, "unless for protective custody purposes and only while awaiting transportation to a treatment facility."

But what if the person subject to a judicial order is in need of protective custody? It makes little sense to say that a person who needs protection may only receive it if she was taken into custody by a peace officer acting on his own initiative, but may not be given protection if that peace officer is complying with a judicial order. If there are two people with identical conditions who need protection, should the silence in section .700 be construed to mean that only the person taken into custody without a judicial order may be protected, but the person subject to the judicial order must be denied protection?

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[73] AS 47.30.700(a).

On the other hand, the silence in .700 could be construed to mean that persons subject to a judicial evaluation order may never be detained in a jail or DOC facility, even for the protective purposes set forth in section .705.

The Court could construe AS 47.30.700(a) not to prohibit the detention of person subject to a judicial evaluation at a DOC facility. The Court acknowledges that this is an awkward construction. The silence of .700(a), without the narrow authorization of section .705 to those who need protection, leaves open the possibility that person subject to a section .700(a) order could be detained even if the person did not need protection.

It is unclear if the Does, by their Motion for Interim Relief, necessarily intended to have the Court construe AS 47.30.700 to prohibit the placement of any civil detainee in a DOC facility. If they did not, it is possible that they intend to seek the Court to make that determination as part of the petition for writ of habeas corpus. While the Does cannot obtain a an order that requires cetin conditions of a future detention, they can ask the Court to determine if the Does were improperly detained in the DOC facility because AS 47.30.700 does not permit any person subject to a judicial evaluation order to be detained in a jail or correctional facility. That request is within the public interest exception to the mootness doctrine.

Neither section .700 nor section .705 mandates an express or objection limitation on the duration of detention in a DOC facility. Section .705

does permit the detainee to be at the jail "only while awaiting transportation to a treatment facility." There is no express limit on the duration of the detention while awaiting transportation. Nor is there a definition of what constitutes "awaiting transportation" as distinguished from being housed with little or an unknown hope of imminent transportation. The evidence of civil detainees spending up to a week and occasionally longer in a DOC facility before going to API or being released is daunting.

The Alaska Supreme Court has construed the statutes authorizing involuntary evaluations and commitments to anticipate and require rapid processing of persons to be evaluated and perhaps committed. In *In re Gabriel C.*,[74] it observed:

> However, the commitment statutes also suggest that a respondent must be transported to an evaluation facility without delay. For example, under AS 47.30.710(b), the mental health professional who performs the initial emergency examination may be required to arrange for the patient's hospitalization "on an *emergency* basis." Under AS 47.30.715, after an evaluation facility receives an ex parte order for evaluation, "it *shall* accept the order *and the respondent* for an evaluation period not to exceed 72 hours." Taken together, these provisions evidence a legislative intent that the respondent who is subject to an emergency ex parte order must be transported immediately to the nearest evaluation facility so that the 72–hour evaluation period can begin without delay.
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> In this case, the record does not establish the cause for the delay in Gabriel's transportation. But it is clear to us that the legislature did not intend to authorize these evaluations to be delayed

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[74] 324 P.3d 835 (Alaska 2014).

simply because the nearest designated evaluation facility is filled to capacity.[75]

The Court reads *Gabriel C.*, by acknowledging "a legislative intent that the respondent who is subject to an emergency ex parte order must be transported immediately to the nearest evaluation facility,"[76] to imply that there is a limit to the duration of the custody of a civil detainee anywhere outside of an evaluation facility. This limit may be informed by the commitments statutes as a whole and the possibility of constitutional limits as well to the deprivation of personal liberty.

The Court concludes that the Does may seek, by way of the petition for a writ of habeas corpus, to establish that there are statutory and/or constitutional limits to the duration of the detention of a person subject to an evaluation order that does not depend upon the specific circumstances of the detainee. They cannot pursue a claim that a person who was in custody, but now is not, was wrongly detained because of the particular circumstances of that person's detention.

D. Summary.

In summary, some of the remedies the Does sought in their Motion for Interim Relief are not available in a petition for habeas corpus. The requests

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75 *Id.* at 838 (footnotes omitted).

76 *Id.*

that future detention at DOC facilities be restricted to those facilities that are the equivalent of a therapeutic facility, that detainees must meet the statutory criteria, not for an evaluation, but for a 30-day commitment, and that DHSS implement statewide prioritization criteria for the selection of detainees to API are requests for corrective action that far surpasses the writ's remedy of release from custody. However, the Doe Plaintiffs may pursue a claim that each was improperly detained, but only if their claims address conditions that are not unique to them. It is not clear if they made that claim in the Motion for Interim Relief.

VIII. The Remedies Sought by DLC.

The DLC seeks a preliminary injunction that precludes DHSS or DOC from housing any person subject to a Title 47 evaluation order in a DOC facility. Furthermore, the DLC wants DHSS to make timely evaluations of those persons subject to the evaluation order, but who are not in an evaluation facility.

The Alaska Supreme Court summarized the alternate tests to be used to determine if a preliminary injunction should issue in *Alsworth v. Seybert.*[77]

> A plaintiff may obtain a preliminary injunction by meeting either the balance of hardships or the probable success on the merits standard. The balance of hardships standard requires balancing the harm the plaintiff will suffer without the injunction against the harm the injunction will impose on the defendant. A preliminary injunction is warranted under that standard when three factors are present: (1) the plaintiff must be faced with irreparable

[77] 323 P.3d 47 (Alaska 2014).

harm; (2) the opposing party must be adequately protected; and (3) the plaintiff must raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be frivolous or obviously without merit." Our rationale in adopting the balance of hardships rule in *A.J. Industries* [*Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537 (Alaska 1970)] demonstrates that a court is to assume the plaintiff ultimately will prevail when assessing the irreparable harm to the plaintiff absent an injunction, and to assume the defendant ultimately will prevail when assessing the harm to the defendant from the injunction:

> Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable, *if the application be denied and the final decree be in his favor,* while if the injunction be granted the injury to the opposing party, *even if the final decree be in his favor,* will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted.

Accordingly, the balance of hardships standard

> applies only where the injury which will result from the temporary restraining order or the preliminary injunction can be indemnified by a bond or where it is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the injunction is not granted. Where the injury which will result from the temporary restraining order or the preliminary injunction is not inconsiderable and may

> not be adequately indemnified by a bond, a showing of probable success on the merits is required.... [78]

The Court must balance the harm civil detainees in DOC custody will suffer if the Court denies the preliminary injunction against the harm to DHSS and DOC if the Court grants it. Similarly, the Court must balance the harm civil detainees awaiting admission to API but not in a DOC facility will suffer against the harm to DHSS and DOC if the Court grants it.

The DLC argues that civil detainees in DOC facilities are being subjected to conditions that amount to punishment in violation of the Due Process Clause of the Fourteenth Amendment. They rely upon *King v. County of Los Angeles*[79] and *Lynch v. Baxley*.[80] *King* begins with the principle that "Under the Due Process Clause of the Fourteenth Amendment, an individual detained under civil process ... cannot be subjected to conditions that amount to punishment."[81] It applied two tests to determine if there is a presumption that confinement is punitive in its effect. The presumption is triggered if 1) "conditions of confinement ... identical to, similar to, or more restrictive than, those in which [a

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78 *Id.* at 54-55 (footnotes and internal quotation marks omitted; italics in supplied in *Alsworth*).

79 885 F.3d 548 (9th Cir. 2018).

80 744 F.2d 1452 (11th Cir. 1984).

81 885 F.3d at 556-57 (internal quotation marks and citations omitted).

civil pre-trial detainee's] criminal counterparts are held," or 2) the conditions are more restrictive than those the individual would face after being found eligible for civil commitment.[82] "If either presumption applies, the burden shifts to the defendant to show (1) legitimate, non-punitive interests justifying the conditions of the detainee's confinement and (2) that the restrictions imposed ... are not excessive in relation to these interests."[83]

There is no dispute that the basic environmental conditions civil detainees experience at DOC facilities are the same as those for pretrial criminal defendants. There is no dispute that civil detainees are kept from interaction with the criminal defendant population, resulting in the civil detainees being precluded from access to most rehabilitative programs. They are kept in their cells for most of the day and are allowed access to communal spaces only during brief periods each day and then may only be there alone. The Court understands DOC's motivation. Indeed DOC is responding admirably to a situation not of its own making. It is playing a role it would rather not. Despite the good intentions of DOC, the civil detainees are being subject to extraordinary conditions that amount to punishment.

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82 *Id.* at 557.

83 *Id.* (internal quotation marks and bracketing omitted).

This does not mean that no person subject to a Title 47 evaluation order can be housed in a DOC facility ever. The *King* presumption allows the State to attempt to justify the confinement. This calls for an individualized analysis of the civil detainee's needs and vulnerabilities. The civil detainees have a spectrum of needs and their mental illnesses can be of various levels of acuity. Some do not need to be in a DOC facility at all and are there only because API is not admitting new patients at that time and DHSS has not arranged for an alternate placement. Some might need to be there for short while, but as acuity changes, could be housed elsewhere. Some are extremely vulnerable and should be housed, even at a DOC facility. For example, the record indicates one civil detainee, who was at a DOC facility when criminal charges were dismissed, was catatonic, lying on the floor, soiled by vomit and feces. It is a curious liberty interest that would require that this person be placed on the sidewalk outside of the facility until a space at API or some other facility became available.

It is difficult to measure precisely the harm the group of civil detainees would suffer if the Court did not grant the preliminary injunction that DLC requests. There is no dispute that every civil detainee would suffer a degradation of his liberty interest. There is no dispute that the longer most stayed in a DOC facility the greater the harm each would suffer. But unless one knew the exact alternative housing option available for each civil detainee one cannot weigh the harm of not being somewhere but not at API and not in a DOC facility.

This uncertain alternatives and thus of the harms suffered by each detainee is only the result of DHSS failing to fulfill its obligations to care for civil detainees who are subject to a Title 47 order, but not at API. *In re Gabriel C.*, identifies the statutory duty that DHSS owes to civil detainees who are not yet inside API or another evaluation facility.

> However, the commitment statutes also suggest that a respondent must be transported to an evaluation facility without delay. For example, under AS 47.30.710(b), the mental health professional who performs the initial emergency examination may be required to arrange for the patient's hospitalization "on an *emergency* basis." Under AS 47.30.715, after an evaluation facility receives an ex parte order for evaluation, "it *shall* accept the order *and the respondent* for an evaluation period not to exceed 72 hours." Taken together, these provisions evidence a legislative intent that the respondent who is subject to an emergency ex parte order must be transported immediately to the nearest evaluation facility so that the 72–hour evaluation period can begin without delay.[84]

DHSS is not taking steps to ensure that civil detainees are "transported immediately to the nearest evaluation facility so that the 72–hour evaluation period can begin without delay."[85] It appears that DHSS contends that its obligation to act is not triggered until a detainee crosses the threshold at API or another evaluation facility. *Gabriel C.* leaves no doubt that while the 72-hour evaluation period does not begin until the detainee reaches the evaluation facility, DHSS has the earlier obligation to fulfill the "legislative intent that the respondent

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84 324 P.3d at 838.

85 *Id.*

who is subject to an emergency ex parte order must be transported immediately to the nearest evaluation facility so that the 72–hour evaluation period can begin without delay."[86]

There is no doubt that DHSS is trying to solve the understaffing crisis at API. And there is no doubt that as API's patient capacity is restored or supplemented by new capacity at other facilities, there will be a reduction of the number of civil detainees waiting in DOC facilities or elsewhere and that the wait will be shorter. But it is also true that DHSS has made no effort to take responsibility for the circumstances of the civil detainees before each reaches API.

DHSS is ignoring its statutory duty that *Gabriel C.* identified. As a result, all civil detainees at DOC facilities are suffering harm by being housed there. There are only a few civil detainees whose needs or vulnerability is so great that the harm to their liberty interests is outweighed by the protection afforded them in the facility. Even those few detainees are harmed by DHSS not actively looking for alternative housing before admission to API, by DHSS not arranging for evaluation before API admission, and by DHSS passively tolerating the duration of detention at DOC facilities. The Court concludes that most, if not all civil detainees housed in a DOC facility are suffering irreparable harm.

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86 *Id.*

It is difficult to identify the harm that DHSS would suffer if the Court granted the preliminary injunction. After all, the Court would not be placing a new obligation on DHSS, but rather it would be demanding that DHSS do what *Gabriel C.* requires. The Court acknowledges that in order for DHSS to fulfill its pre-admission obligations, it will have to craft a program to do so and to spend money and resources.[87] DHSS has the obligation in the first instance to determine how to fulfill its obligation under *Gabriel C.* The Court does not have the expertise to know how DHSS can best fulfill that obligation. DHSS would be constrained in its options if the Court dictated a precise solution. That would harm DHSS and in turn possibly harm all of DHSS's constituents, not just the set of person subject to a Title 47 evaluation order.

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[87] The Court is aware of the trial court's erroneous legal reasoning that the supreme court reversed in *Alsworth.* It held:

> The proper inquiry under the balance of hardships standard is not whether the injunction merely orders a defendant to comply with the law, but whether, assuming the defendant will ultimately prevail, "the injury which will result from the ... injunction can be indemnified by a bond or ... is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the injunction is not granted.

323 P.3d at 55. *Gabriel C.* minimizes the chance that the Court is wrong is concluding that DHSS owes a duty to pre-admittees. But even if the Court is wrong the harm to DHSS is relatively slight compared that already being suffered by detainees.

The Court appreciates that the current leaders of DHSS did not cause, but inherited, the API crisis. The Court was impressed by Deputy Commissioner Wall's appreciation of the crisis and the damage being inflicted on vulnerable citizens by API's incapacity. The Court has no doubt that he and his staff are working diligently to address the understaffing. But DHSS cannot ignore those waiting to get into API.

The Court is reluctant to include requirements in an injunction that undercuts the efforts of DHSS to fix API internally. It assumes that the problems of those waiting for an evaluation can be addressed by any number of solutions and by a combination of work by API or other providers in conjunction with DHSS. During one evidentiary hearing, the Court suggested that API arrange to have those civil detainees housed in a DOC facility or elsewhere be evaluated where they were, rather than wait until they were admitted to API. Several problems were identified. If API staff was required to perform evaluations outside of API itself, then those extra duties would only further burden those staff members who remained with the API population. Capacity at a given time would decline further. If some persons, not API staff, were contracted to perform evaluations outside API, say at hospital emergency rooms, then there might be complicated questions of gaining permission or privileges for the contractor to act on hospital premises. The question of liability might be complex. Nonetheless, it is significant that DOC contracts to have evaluators come into its facilities to see if a

person's mental state warrants applying for an evaluation order or the release of a person subject to an order, but who no longer meets criteria.[88]

The Court concludes that DHSS will suffer no harm if it is required to fulfill its obligations identified in *Gabriel C.* in general. Nor will it be harmed if it must takes steps to greatly minimize, if not eliminate entirely, the housing of civil detainees at DOC facilities except for the shortest time necessary, and in the most extreme circumstances.

The Court also concludes that DHSS will be harmed to the extent that the Court imposes the particular mechanisms, solutions, or resources that DHSS must design or utilize to fulfill its obligations. The Court must be careful not to undercut existing efforts, but nonetheless must enforce those obligations that DHSS has not been fulfilling.

In order to minimize the harm of an injunction, the Court will not dictate how DHSS fulfills its obligations as identified in *Gabriel C.* By doing that the Court can ensure that DHSS is protected. No bond is necessary.

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[88] AS 47.30.720 provides:

> If at any time in the course of the 72-hour period the mental health professionals conducting the evaluation determine that the respondent does not meet the standards for commitment specified in AS 47.30.700, the respondent shall be discharged from the facility or the place of evaluation by evaluation personnel and the petitioner and the court so notified.

For those persons subject to a Title 47 evaluation order who are waiting for admission to API or an evaluation facility, but not housed in a DOC facility, the harm they will suffer if the Court does not issue a preliminary injunction is less than that suffered by those waiting in a DOC facility. They are not being subjected to the punishment that results from being held in a jail or correctional facility.

Nonetheless, this group is suffering significant delay before being released or finally admitted to API. If waiting in an emergency room, the type of treatment that each person gets varies greatly, depending upon the psychiatric services available in a particular emergency room. Presumably all are receiving the care normally offered for medical, non-psychiatric needs. But many are not being evaluated or, if evaluated, not receiving treatment.

The following table shows the number of persons in each of eight months who were held subject to the evaluation order for 6, 7, 8, 9, or 10 plus days before getting to API, another evaluation facility, or otherwise disposed. In those months, 68 persons waited 10 or more days before disposition.

Days to Dispo.	**Feb.**	**March**	**April**	**May**	**June**	**July**	**August**	**Sept.**
6	6	9	7	6	7	6	6	2
7	11	5	5	14	8	8	8	13
8	6	5	5	4	4	2	5	6
9	4	3	5	2	2	2	4	3
10+	2	16	18	11	11	4	2	4
Total	**29**	**38**	**40**	**32**	**32**	**22**	**25**	**28**

There are scores more who waited less than six days for a disposition. All of these persons suffered irreparable harm caused by the delay before they are receiving an evaluation. The harm increases as each day passes before DHSS complies with its obligation under *Gabriel C.* that persons subject to Title 47 evaluation orders "be transported immediately to the nearest evaluation facility so that the 72–hour evaluation period can begin without delay."[89] Persons who are subject to future Title 47 evaluation orders who have to wait day after day to be evaluated will suffer irreparable damage that increases with each day.

DHSS will not be harmed by the issuance of a preliminary injunction requiring it to craft a plan to fulfill its obligation under *Gabriel C.* to those subject to an evaluation order, but who are not at a DOC facility.

IX. The Preliminary Injunction.

By 5 December 2019 DHSS shall provide the Court with a plan that details how it will fulfill its obligation under *Gabriel C.* that persons subject to Title 47 evaluation orders "be transported immediately to the nearest evaluation facility so that the 72–hour evaluation period can begin without delay."[90] DHSS shall assume that its efforts to return API to full capacity will continue, but that full capacity will not be achieved soon. It is not sufficient to say that the best way

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89 324 P.3d at 838.

90 *Id.*

to help those awaiting admission is only by restoring capacity at API or increasing capacity at other evaluation facilities.

The plan must meet these minimum criteria:

1. Demonstrate how DHSS will identify each person subject to an evaluation order pursuant to AS 47.30.700 or .705 and the period within which DHSS must be informed of the persons in order to meet its *Gabriel C.* obligations.

2. Identify the factors to be used to prioritize the admission of persons subject to an evaluation order into an evaluation facility, as well as the relative weights of the factors (while DHSS may consider the length of time a person has been subject to an evaluation order, it cannot simply admit persons in chronological order by the date of the evaluation order).

3. Identify the procedures to be used to determine how each person subject to an evaluation order meets the factors on the prioritization protocol and identify who will make this determination.

4. Identify procedures and mechanisms whereby a person, subject to an evaluation order, who is waiting to be admitted to an evaluation facility can be evaluated, outside of an evaluation facility, to determine if that person no longer meets evaluation criteria or could be transported to an alternate facility.

5. The population of civil detainees in a DOC facility can be divided into two groups: a) persons subject to an evaluation order that DOC

obtained while the person was in DOC custody, and b) persons subject to an evaluation order who were brought to DOC because an evaluation facility was unable to admit them and there were no criminal charges pending.

For the first group DHSS shall demonstrate a procedure whereby members of the group remain at the DOC facility for no more than 24 hours after criminal charges were dismissed. For the second group, DHSS shall demonstrate a procedure whereby members do not go to a DOC facility, except in the rarest circumstances (and providing guidelines concerning those circumstances).

6. Describe how DHSS shall ensure that persons subject to an evaluation order, regardless of where housed, are advised of their legal rights, in writing.

7. The plan shall be implemented in 90 days or DHSS shall demonstrate what parts of the plan cannot be met by that deadline, and provide an estimate of how much longer implementation will require and why.

X. Conclusion.

The Motion for Interim Relief is DENIED in part. The Motion for Preliminary Injunction is GRANTED.

DONE this 21st day of October 2019, at Anchorage, Alaska.

William F. Morse
Superior Court Judge

CERTIFICATE OF SERVICE

I certify that on 21 October 2019
a copy of the above was emailed/mailed to each of the
following at their addresses of record:

PDA: L. Beecher, E. Brennan
AGO: S. Bookman, M Cicotte,
M. Regan
J. Cahoon

Ellen Bozzini
Judicial Assistant